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Nelson Tree Service, Inc. and International Brotherhood of Electrical Workers, Local Union 369, AFL-CIO-CLC, Petitioner. Case 09–RC–118324

December 16, 2014

DECISION AND ORDER REMANDING

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,
AND HIROZAWA

The National Labor Relations Board, by a three-member panel, has considered objections to an election held January 13, 2014, and the Regional Director’s report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 15 for and 29 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the Regional Director’s findings and recommendations only to the extent consistent with this Decision.¹ For the reasons stated by the Regional Director, we adopt his recommendation to overrule the Petitioner’s Objection 3, 4, and 7. However, regarding the evidence of possible additional objectionable conduct, unalleged in the Petitioner’s objections but uncovered by the Regional Director during his investigation of an unfair labor charge, we find, in agreement with the Petitioner, that the Regional Director erred in failing to consider that evidence as grounds for setting aside the election.

On January 30, 2014,² 2 weeks after the Petitioner filed timely objections in this case, it filed an unfair labor practice charge concerning the Employer’s postelection discharge of a prounion employee, and, on April 14, the Regional Director issued a consolidated complaint including that allegation. During the course of investigating the charge, the Regional Director discovered evidence that the Employer had maintained potentially overly broad work rules in its employee handbook and so informed the Petitioner, which filed charges alleging those work rules violated the Act. Then, on April 15, in submitting additional evidence in support of its objections, the Petitioner requested that the Regional Director set aside the election based on the Employer’s maintenance of the alleged overly broad work rules in addition

to the conduct alleged in its objections. On May 21, the Regional Director issued a second consolidated complaint that included allegations that the work rules at issue were unlawful. On June 4, the Employer entered into a settlement agreement, which was approved by the Regional Director, in which it agreed to rescind the challenged rules.

On June 12, the Regional Director issued his Report on Objections, recommending that the Board overrule the Petitioner’s objections in their entirety. In doing so, the Regional Director declined to consider evidence of the Employer’s allegedly overbroad work rules. The Regional Director found that the Petitioner was required to show that they were newly discovered and previously unavailable and failed to do so. The Regional Director further found that considering the rules would mean accepting “piecemeal objections,” an undesirable consequence noted by the Board in *Alandco Development Corp.*, 341 NLRB 1004, 1010–1011 (2004). We disagree with the Regional Director and find that he should have considered the evidence regarding the handbook rules and whether this additional unalleged misconduct constituted objectionable conduct warranting a new election.

It is well established that if the Regional Director “receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election.” *American Safety Equipment Corp.*, 234 NLRB 501, 501 (1978), enfd. denied on other grounds 643 F.2d 693 (10th Cir. 1981). In the instant case, the Regional Director discovered evidence of the allegedly overbroad work rules while investigating an unfair labor practice charge and issued a complaint alleging that the work rules were unlawful, while the timely election objections were still pending decision. Under these circumstances, we find that the Regional Director had the duty to consider whether this evidence was relevant to the conduct of the election. See *American Safety Equipment Corp.*, above. See also *National Electric Coil Div.*, 184 NLRB 691, 691–692 (1970) (“having discovered evidence of an unfair labor practice sufficient to support a settlement agreement, it was incumbent upon [the Regional Director] to consider whether this evidence [of an alleged no-solicitation/no-distribution rule] was relevant to the conduct of the election”).

Further, as it is undisputed that the evidence was discovered independently by the Regional Director, not at the Petitioner’s initiative, we find that the Petitioner was not required to show that the evidence was newly discovered and previously unavailable. See *Alandco Devel-*

¹ In the absence of exceptions, we adopt pro forma the Regional Director’s recommendation to overrule the Petitioner’s Objections 1, 2, 5, and 6.

² All dates are in 2014.

opment Corp., 341 NLRB at 1011. See also NLRB Casehandling Manual, Part Two, Representation Proceedings, Section 11392.11. We further find that any concerns about “piecemeal objections” are not present in this case, where the Petitioner neither filed late or supplemental objections nor caused undue delay in concluding the Regional Director’s investigation of the election objections.

Accordingly, this case is remanded to the Regional Director for further investigation and a hearing, if necessary, with respect to whether the Employer’s allegedly overbroad handbook rules warrant setting aside the election.

ORDER

IT IS ORDERED that this proceeding is remanded to the Regional Director for further investigation and a hearing,

if necessary, and for issuance of a supplemental report consistent with this decision.

Dated, Washington, D.C. December 16, 2014

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD